Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1994

MARJORIE ZICHERMAN, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF MURIEL A.M.S. KOLE, AND MURIEL MAHALEK,
Petitioners,
v.
KOREAN AIR LINES CO., LTD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR WRIT OF CERTIORARI.

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QUESTIONS PRESENTED FOR REVIEW

1. Must a surviving parent or sibling prove that they were financially dependent on a decedent in order to recover damages for loss of society under the Warsaw Convention?

2. May a surviving parent or sibling recover damages for grief under the Warsaw Convention?

3. Must a surviving parent or sibling prove that they were financially dependent on a decedent in order to recover damages for loss of support and loss of inheritance under the Warsaw Convention?

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OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is not yet officially reported. It is reproduced in the Appendix to this Petition. Opinions from the United States District Court for the Southern District of New York are reported at 814 F.Supp. 605 (S.D.N.Y. 1993), 807 F.Supp. 1073 (S.D.N.Y. 1992), and 146 F.R.D. 61 (S.D.N.Y. 1992).

JURISDICTION

The judgment of the Court of Appeals was entered on November 3, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PROVISIONS OF LAW INVOLVED

This case raises the interpretation of Aricle 17 of the Warsaw Convention, known formally as the Convention for Unification of Certain Rules Relating to International Transportation by Air, 49 Stat. 3000, T.S. No. 876 (1934), *reprinted in* 49 U.S.C. § 1502 note.

WARSAW CONVENTION ARTICLE 17

"The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking."

STATEMENT OF THE CASE

Korean Air Lines Flight 007 strayed into Soviet airspace and was shot down on September 1, 1983. All those aboard perished. Among the passengers was Muriel A.M.S. Kole, whose mother, Muriel Mahalek ("Mahalek"), and sister, Marjorie Zicherman ("Zicherman"), are the Petitioners before this Court.

The Petitioners filed suit against Korean Air Lines Co., Ltd ("KAL") in the Southern District of New York. Each Petitioner sought recovery in her individual capacity, and Zicherman also sued as the personal representative of her sister's estate. Along with all other federal court actions arising out of the KAL tragedy, the Petitioners' case was transferred to the United States District Court for the District of Columbia for consolidated proceedings on the question of liability. *See In re Korean Air Lines Disaster of September 1, 1983*, 575 F.Supp. 342 (J.P.M.D.L. 1983).

Following a jury trial, KAL was found liable for "wilful misconduct" in connection with the Flight 007 tragedy. Under Article 25 of the Warsaw Convention, KAL therefore could not invoke the $75,000.00 cap on damages that would otherwise be available. The Petitioners' case was then remanded to the District Court for a damages trial.[1]

Before a jury was empaneled to assess damages against KAL, the District Court made rulings on the elements of damages recoverable under the Warsaw Convention. The District Court ruled, *inter alia*, that the Petitioners could recover for loss of the decedent's society, and for mental injury they suffered in the aftermath of the tragedy.[2] *See* 807 F.Supp. at 1077-78, 1084-88. The District Court did not require that the Petitioners prove they were financially dependent on the decedent in order to recover damages for loss of society.

After hearing evidence, the jury awarded damages to the Petitioners as follows:

Mahalek		
1.	Mental injury	$ 96,000
2.	Loss of society	$ 28,000

[1] In the interests of brevity, some of the steps along the way of the complex multidistrict proceedings have been omitted.

[2] "Mental Injury" is used interchangeably with "grief" in the opinions below.

Zicherman		
1.	Mental injury	$ 65,000
2.	Loss of society	$ 70,000
3.	Loss of support	$ 5,000
4.	Loss of inheritance	$ 11,000
Zicherman (as executrix)		
1.	Decedent's conscious pain and suffering	$100,000

The District Court computed prejudgment interest, and entered final judgment.

KAL noticed an appeal from the District Court's final judgment, contesting all of the damages awarded on both legal and factual grounds. In an opinion dated November 3, 1994, the Second Circuit affirmed the District Court's judgment, with two important exceptions:

1. The Second Circuit ruled that damages for loss of society cannot be recovered under the Warsaw Convention unless the surviving relative was financially dependent on the decedent;

2. The Second Circuit also ruled that damages for mental injury are not recoverable under the Warsaw Convention under any circumstances.

Because the jury had not been instructed that financial dependency was a prerequisite to recovery for loss of society, the Second Circuit examined the record for evidence on the question. It found that Mahalek was, without question, not financially dependent on her daughter, and accordingly vacated all of the damages that Mahalek had been awarded. As to Zicherman, the Second Circuit found some evidence of financial dependency, and therefore remanded the case back to the Dis-

trict Court for a determination on this narrow question.[3] The mental injury award to Zicherman was vacated.

After the Second Circuit issued its November 3 opinion, KAL petitioned for a rehearing. On December 5, 1994, the Second Circuit withdrew its initial opinion, and filed an amended opinion. In the amended opinion, the Second Circuit ruled that the jury's awards for loss of support and loss of inheritance were also subject to a financial dependency requirement. These two awards were therefore vacated, pending further proceedings in the District Court.

Zicherman and Mahalek now petition this Court for a writ of certiorari.

SUMMARY OF ARGUMENT

There are three compelling grounds for this Court to grant certiorari and review the decision below.

1. A conflict exists among circuit courts as to whether federal damage law requires a showing of financial dependency in order to recover loss of society damages. By imposing a financial dependency requirement, the Second Circuit adopted a cruel and irrational rule of law, one that is particularly inappropriate under the unique structure of the Warsaw Convention.

2. A conflict exists among circuit courts concerning recovery for mental injury under federal law. The Second Circuit's ruling unduly restricts recovery under the Convention, and affords an unconscionable degree of economic protection to

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[3] This very narrow remand should not interfere with this Court's review of the Petitioner's case. Indeed, if this Court were to reverse the Second Circuit's ruling on financial dependency, further proceedings in the District Court would probably be unnecessary. *See generally Frisby* v. *Schultz*, 487 U.S. 474, 479 (1988) (Supreme Court will review Court of Appeals judgment even if further proceedings in District Court are contemplated, where those further proceedings would not aid Supreme Court's review of case).

the airline industry where a carrier has been found liable for egregious, willful misconduct.

3. Numerous cases arising from the KAL tragedy and the disaster at Lockerbie, Scotland are pending in Courts of Appeal and District Courts around the country. This Court should provide definitive guidance on the elements of damages recoverable under the Warsaw Convention to prevent conflicting and inconsistent results.

ARGUMENT

I. Certiorari Should Be Granted to Resolve Conflicting Opinions on Recovery for Loss of Society Damages.

The Second Circuit drew exclusively on general federal maritime law to decide what damages are recoverable under the Warsaw Convention. It then followed those Circuit Courts of Appeal that impose a financial dependency requirement for loss of society damages under general maritime law. *See, e.g., Anderson* v. *Whittaker Corp.*, 894 F.2d 804, 811-12 (6th Cir. 1990); *Sistrunk* v. *Circle Bar Drilling Co.*, 770 F.2d 455 (5th Cir. 1985). The Second Circuit recognized, however, that the Ninth Circuit has reached the opposite result; the Ninth Circuit has ruled that there is no need to establish financial dependency. *Sutton* v. *Earles*, 26 F.3d 903, 914-17 (9th Cir. 1994).

Although the Second Circuit's position is followed by other circuits, the rule espoused by the Ninth Circuit is more sensible, more modern, and should be adopted. Financial dependency has no rational relationship of any kind to loss of companionship, and it is crass and inhumane to suggest otherwise. In the case below, Mahalek worked hard her whole life, supported herself, and did not look to her children for support; as a result, she recovered nothing for the loss of her daughter. Had she

been lazy, or a freeloader, and insisted on support from the decedent, she would have recovered. This is an absurd result, and it must not stand.

This Court has recognized that, at least for federal general maritime wrongful death actions, loss of society is recoverable. *Sea-Land Services, Inc.* v. *Gaudet*, 414 U.S. 573 (1974). Although the issue of financial dependency was not raised under the facts of *Gaudet*, imposing a dependency requirement is inconsistent with this Court's definition of "society" as embracing a broad range of mutual benefits *each family member* receives from the others' continued existence, including love, affection, care, attention, companionship, comfort, and protection. 414 U.S. at 585 (emphasis added).

It must also be remembered that the case below was not a maritime case *per se*, but rather a Warsaw Convention case. Although the Second Circuit properly drew on maritime law for some guidance in construing the Convention, it failed to take note of one special feature not found in maritime law: the damage cap. In the vast majority of international aviation accidents, Article 25 of the Warsaw Convention limits the air carrier's liability to $75,000.00 per passenger. This is a tremendous economic advantage for the aviation industry, one that the shipping industry does not have. As a result, in the rare case of willful misconduct, it is unfair to further limit liability by imposing a financial dependency requirement on loss of society damages.[4]

II. Certiorari Should Be Granted to Resolve the Question of Recovery for Mental Injury Under the Warsaw Convention.

There are two divergent lines of authority that address recovery for grief or mental injury under federal law. First: cases

[4] For these reasons, awards for loss of support and loss of inheritance should also be unfettered by a financial dependency requirement.

decided under civil rights statutes tend to permit recovery for mental injury. *See, e.g., Bell* v. *City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984); *Berry* v. *City of Muskogee, Oklahoma*, 900 F.2d 1489 (10th Cir. 1990); *Henry* v. *Gross*, 803 F.2d 757, 768 (2d Cir. 1986). Second: general maritime cases deny recovery for mental injury. *See, e.g., Mobil Oil Corp.* v. *Higgenbotham*, 436 U.S. 618, 622 (1978).

Under Article 17 of the Warsaw Convention, a decision must be made as to which line of authority to follow concerning mental injury damages. The Second Circuit elected to follow maritime law. As discussed above, this decision is inappropriate, because the Warsaw Convention has a $75,000.00 damage cap in most cases, while maritime law does not. The aviation industry is thus afforded an unconscionable double layer of protection from tortious misconduct.

Apart from the damages cap, the Second Circuit's opinion also overlooked the history behind the Warsaw Convention. The drafters of the Convention understood that "damage sustained" in Article 17 included the mental injury of surviving relatives. *See In re Air Disaster of Lockerbie, Scotland*, 928 F.2d 1267, 1282 (2d Cir. 1993), *citing* Lowenfeld, *Aviation Law*, § 1.52 at 7-19 (2d ed. 1981) (relying on French legal meaning of "dommage," or damage). Specifically:

> There is nothing in French law prohibiting compensation for any particular kind of damage, be it mental injury, suffering due to the death of a member of a family, or pain and suffering due to a physical injury.

In re Korean Air Lines Disaster of September 1, 1983, 932 F.2d 1475, 1487 (D.C. Cir. 1991), *quoting* Miller, *Liability in International Air Transport*, 112 (1977). *See also Diaz-Lugo* v. *American Airlines, Inc.*, 686 F.Supp. 373, 376 (D.P.R. 1988) (under Article 17, both loss of consortium and emotional

distress suffered by non-passenger when passenger was injured constitute "damage sustained").

This Court has never directly addressed recovery for a relative's mental injury under the Warsaw Convention. However, in *Eastern Airlines, Inc.* v. *Floyd*, 111 S.Ct. 1489 (1991), this Court analyzed the French term "lésion corporelle" (bodily injury) as it appears in Article 17:

> The carrier shall be liable for damage sustained ["dommage survennu"] in the event of the death or wounding of a passenger or any other bodily injury ["lésion corporelle"] suffered by a passenger . . .

49 Stat. 3018. The passengers involved in the *Floyd* case had experienced fright while on board an aircraft, but had not been physically injured; this Court decided that there had been no "lésion corporelle," and denied recovery.

The decision in *Floyd* is not directly applicable to the case below, because Muriel Kole died in the crash of Flight 007; there was therefore no need to consider whether a "lésion corporelle" occurred on board the plane. Here, the only question is whether or not her survivors' mental injury constitutes "dommage survenu," or damage sustained, a question that this Court alluded to, but explicitly declined to address in *Floyd*. 111 S.Ct. at 1496, n.7. Nonetheless, by citing French law sources that did permit recovery for the grief and mental injury of a surviving relative, this Court implied that such a recovery should also be permitted by federal courts construing the Warsaw Convention. *See also Air France* v. *Saks*, 470 U.S. 392, 399 (1985) (French legal history and doctrine is of considerable importance when construing the Warsaw Convention).

III. Cases Pending Across the Country Await a Definite Ruling on Damages Recoverable Under the Warsaw Convention.

There are currently at least 31 pending cases arising out of the KAL tragedy that have not yet had a jury trial to assess damages. In addition, KAL has appeals of damage verdicts which are pending in the Second, Sixth and Ninth Circuit Courts of Appeal, as well as the District of Columbia Circuit Court of Appeals. Given the uncertainty over the elements of damages recoverable under the Warsaw Convention, the risk of inconsistent treatment of similarly situated plaintiffs is great.

It should also be noted that the bombing of Pan American flight 103 over Lockerbie, Scotland, led to a finding of willful misconduct by the defendant airline. *See Pagnucco et al.* v. *Pan American World Airways, Inc.*, ___ F.3d ___ (Nos. 1280, 1281, 1282, 2d. Cir., 1994). There are approximately 210 damages cases waiting to be tried in the aftermath of the *Lockerbie* decision. These cases also await definitive guidance from this Court on the damages available under the Convention. The case below offers this Court its first opportunity to reach this issue.

CONCLUSION

Certiorari should be granted to review the decision below.

Respectfully submitted,

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APPENDIX A.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 542, 667 August Term, 1993

Petition for Rehearing Submitted: November 17, 1994

Docket Nos. 93-7490; 93-7546

MARJORIE ZICHERMAN, individually and as executrix under the estate of Muriel A.M.S. Kole; MURIEL MAHALEK, mother and next of kin of Muriel A.M.S. Kole,

Plaintiffs-Appellees/Cross-Appellants,

MICHAEL KOLE,
Plaintiff,

– against –

KOREAN AIR LINES CO., LTD,
Defendant-Appellant/Cross-Appellee.

Before: LUMBARD, VAN GRAAFEILAND, and WINTER, Circuit Judges.

Petition for rehearing of decision rendered November 3, 1994. Upon consideration of the petition, the opinion filed November 3, 1994, is withdrawn, and an amended opinion is filed. The petition for rehearing is denied.

Defendants appeal from a judgment entered in the District Court for the Southern District of New York (Motley, J.) on April 12, 1993, following a jury verdict in a wrongful death action. Plaintiffs cross-appeal the trial court's calculation of prejudgment interest.

Affirmed in part, vacated in part, and remanded in part.

W. PAUL NEEDHAM, Boston, Massachusetts (Needham & Warren, Boston, Massachusetts, Kevin M. Hensley; Christopher Lovell, New York, New York, of counsel), for Plaintiffs-Appellees/Cross-Appellants.

ANDREW J. HARAKAS, New York, New York (Condon & Forsyth, New York. New York, George N. Tompkins, Jr., Jeanine C. Veracoechea, George N. Tompkins, III, Peter F. Tamigi, of counsel), for Defendant-Appellant/Cross-Appellee.

LUMBARD, Circuit Judge:

These appeals were argued on October 28, 1993. We delayed our determination pending a decision in *In re Air Disaster at Lockerbie, Scotland on December 21, 1988*, slip op. 7795 (2d Cir. Sept. 12, 1994) ("*Lockerbie II*"), which already had been heard by a different panel on May 19, 1993.

Korean Air Lines Co., Ltd ("KAL") appeals from a judgment of the Southern District of New York (Motley, J.) entered on April 12, 1993, following a jury verdict which awarded damages of $251,000 to Marjorie Zicherman and $124,000 to Muriel Mahalek, the surviving sister and mother, respectively, of KAL passenger Muriel Kole. After trial, the district court granted prejudgment interest on the judgment, but discounted the jury award at a rate of 2% per annum to the date of the accident in calculating prejudgment interest. *Zicherman* v. *Korean Air Lines Co., Ltd*, 814 F.Supp. 605, 612 (S.D.N.Y. 1993).

KAL argues that: (1) federal maritime law precludes plaintiffs' recovery for loss of society; (2) federal maritime law precludes plaintiffs' recovery for mental injury or grief; (3) the evidence was insufficient to sustain an award to Zicherman as executrix of the estate for Kole's conscious pain and suffering; and (4) the evidence was insufficient to sustain an award to Zicherman for loss of support and loss of inheritance. Plaintiffs cross-appeal the court's discounting of prejudgment interest.

The award for pain and suffering and the district court's calculation of prejudgment interest are affirmed. The awards for mental injury and Mahalek's loss of society are vacated. The awards to Zicherman for loss of society, loss of support, and loss of inheritance are reversed and remanded.

I.

On September 1, 1983, KAL flight KE007, en route from New York to Seoul, South Korea, strayed into Soviet airspace over the Sea of Japan and was shot down. All 269 persons on board died, including Muriel Kole. Zicherman and Mahalek, surviving relatives of Kole, brought suit in the Southern District of New York to recover damages.

The Judicial Panel on Multidistrict Litigation transferred all federal court actions arising out of the disaster to the District of Columbia for trial on the common issue of liability. *In re Korean Air Lines Disaster of September 1, 1983*, 575 F.Supp. 342 (J.P.M.D.L. 1983). After a jury determined that the crash was proximately caused by KAL's "willful misconduct," *see In re Korean Air Lines Disaster of September 1, 1983*, 932 F.2d 1475 (D.C. Cir.), *cert denied*, 112 S.Ct. 616 (1991), the Multidistrict Panel remanded the individual cases to their courts of origin to determine damages.

Prior to trial of Zicherman and Mahalek's damages, KAL moved for a determination that the Death on the High Seas Act ("DOHSA"), 46 U.S.C. §§ 761-68 (1988), limited dependent survivors' recovery to pecuniary losses. Judge Motley denied the motion, holding that plaintiffs as close surviving relatives could recover for loss of love and affection ("loss of society") and for mental injury and grief, and that Zicherman as executrix of Kole's estate could recover for Kole's pre-impact conscious pain and suffering. *In re Korean Air Lines Disaster of September 1, 1983*, 807 F.Supp. 1073, 1080-88 (S.D.N.Y. 1992).

At trial, two expert witnesses testified as to Kole's conscious pain and suffering. James Foody, an aeronautical engineer, testified that the Soviet aircraft fired two missiles, which struck the KAL plane at an altitude of 35,000 feet; that the missiles probably caused a five-foot hole in the rear fuselage; and that the plane remained airborne for twelve minutes there-

after. Robert Elzy, an aviation physiologist, testified that such a hole would cause rapid decompression of the plane; that passengers would experience intense pain in their ears, sinuses, lungs, stomach, and intestines due to decompression; and that passengers had sufficient time to don oxygen masks which would allow them to remain conscious during the plane's descent.

Zicherman testified that she had received financial assistance from Kole. Kole had paid Zicherman's wedding expenses and had volunteered to finance Zicherman's purchase of a new home. Prior to Kole's flight, Zicherman — who was then pregnant — received an envelope to be opened in the event of Kole's death; the envelope contained a letter describing Kole's assets and stating, "[t]ake everything and spend it on yourself and the baby, if anything happens to me." In contrast, Mahalek stated on cross-examination that she was never financially dependent on Kole.

The jury returned a total verdict of $375,000 as follows:

Mahalek		
1.	Mental injury	$ 96,000
2.	Loss of society	$ 28,000
Zicherman (personal capacity)		
3.	Mental injury	$ 65,000
4.	Loss of society	$ 70,000
5.	Loss of support	$ 5,000
6.	Loss of inheritance	$ 11,000
Zicherman (as executrix of Kole's estate)		
7.	Kole's pain and suffering	$100,000

The district court ruled that plaintiffs were entitled to prejudgment interest. The court discounted the judgment back to the date of the accident at a rate of 2% per annum and awarded prejudgment interest on that amount.

II.

Where injuries occur on an international flight, the Warsaw Convention provides an exclusive cause of action. *See* Convention for the Unification of Certain Rules Relating to International Transportation by Air, *done* at Warsaw, October 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11, *reprinted at* 49 U.S.C. § 1502 note (1988); *In re Disaster at Lockerbie, Scotland on December 21, 1988*, 928 F.2d 1267, 1274-80 (2d Cir.) ("*Lockerbie I*"), *cert. denied*, 112 S.Ct. 331 (1991). However, because the Warsaw Convention is silent on the question of damages, we look to federal law to decide such issues. *Lockerbie I*, 928 F.2d at 1278-79.

KAL argues that because flight KE007 was shot down over non-territorial waters, the applicable law is DOHSA, which expressly limits recovery to pecuniary loss. 46 U.S.C. § 762; *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618, 622-26 (1978). We disagree.

In *Lockerbie I*, we adopted the federal common law to govern causes of action under the Warsaw Convention. 928 F.2d at 1278. In *Lockerbie II*, we held that damages under the Warsaw Convention should be determined "by an examination of maritime law, which is probably the oldest body of federal common law." Slip op. at 7841. While two maritime statutes — DOHSA and the Jones Act, 46 U.S.C. app. § 688 (1988) — preclude recovery for non-pecuniary loss, general maritime cases not brought under such statutory restrictions allow recovery. *Id.*, slip op. at 7841-42; *Sea-Land Services, Inc.* v. *Gaudet*, 414 U.S. 573, 585-88 (1974) (recognizing loss of society damages as remedy available under general maritime law). Looking at the language and underlying policies of the Warsaw Convention, we concluded that compensatory, non-pecuniary damages are appropriate under the Convention. *Lockerbie II*, slip op. at 7842-43. Accordingly, we held that

under the general maritime principles of *Gaudet* and its progeny, the Warsaw Convention permits recovery for loss of society. *Id.*, slip op. at 7843.

KAL seeks to distinguish the *Lockerbie* decisions as involving an accident over dry land, whereas the present action involves an accident over water. However, as we have stressed, a uniform law should govern Warsaw Convention cases. *Lockerbie I*, 928 F.2d at 1278-79. Adopting one rule for Convention cases involving accidents over land and another for accidents over water would defeat such uniformity.

Our holding is consistent with the Congressional scheme under DOHSA, which was enacted in 1920 to create a federal cause of action for accidental deaths occurring on the high seas. The Supreme Court has held that DOHSA preempts state causes of action in disputes arising from accidental deaths in non-territorial waters. *Offshore Logistics, Inc.* v. *Tallentire*, 477 U.S. 207 (1986) (applying DOHSA to offshore helicopter crash). In contrast to *Tallentire*, however, the present causes of action arise not under domestic law but under the Warsaw Convention, an international treaty. Unlike *Tallentire*, therefore, the question before us is not whether to apply federal or state law, but rather which federal law to apply. We cannot reconcile DOHSA's limitation of damages to pecuniary loss with the "aim of the Convention's drafters and signatories . . . to provide full compensatory damages for any injuries or death covered by the Convention," *Lockerbie II*, slip op. at 7842, including non-pecuniary loss. In order to maintain a uniform law under the Warsaw Convention, we find general maritime law, rather than DOHSA, more appropriate. *See, e.g., Domangue* v. *Eastern Air Lines, Inc.*, 722 F.2d 256, 262 (5th Cir. 1984) ("[T]he Warsaw Convention and Montreal Agreement were intended to act as a uniform international law which supplants each member nation's varied laws.")

Under federal maritime law, the rule is well-established that only dependents may recover damages for loss of decedent's

society. *Wahlstrom* v. *Kawasaki Heavy Industries, Ltd.*, 4 F.3d 1084, 1092 (2d Cir. 1993), *cert. denied*, 114 S.Ct. 1060 (1994); *Anderson* v. *Whittaker Corp.*, 894 F.2d 804, 811-12 (6th Cir. 1990) *Sistrunk* v. *Circle Bar Drilling Co.*, 770 F.2d 455 (5th Cir. 1985), *cert. denied*, 475 U.S. 1019 (1986); *but see Sutton* v. *Earles*, 26 F.3d 903, 914-17 (9th Cir. 1994) (allowing nondependent parents to recover loss of society damages in general maritime action). No doubt this rule denies recovery to some deserving parties; nondependent survivors may feel the loss of a loved one as keenly as dependent survivors. However, the inherent concerns of vagueness and uncertainty "necessitate[] that we draw a line between those who may recover for loss of society and those who may not." *Miles* v. *Melrose*, 882 F.2d 976, 989 (5th Cir. 1989), *aff'd sub nom. Miles* v. *Apex Marine Corp.*, 498 U.S. 19 (1990). This distinction between dependents and nondependents has been commended "as the most rational, efficient and fair." *Miles*, 882 F.2d at 989.

In *Lockerbie II*, we extended to Warsaw Convention cases the general maritime rule limiting loss of society damages to dependents, *see* slip op. at 7844. Under that rule, Zicherman and Mahalek may recover loss of society damages only if they were dependents of Kole at the time of her death.

The test of dependency is the existence of "a legal or voluntarily created status where the contributions are made for the purpose and have the result of maintaining or helping to maintain the dependent in [her] customary standard of living." *Petition of United States*, 418 F.2d 264, 272 (1st Cir. 1969). Because Judge Motley did not explicitly instruct the jury to condition their awards for loss of society on finding such a status, we scrutinize the record to determine what findings a jury could make on this issue.

KAL contends that, as a matter of law, Mahalek may not recover loss of society damages. The record shows that Mahalek

offered no evidence to support a claim of dependency. Further, Mahalek specifically conceded on cross-examination her lack of dependence. Presented with such evidence, no jury could find Mahalek entitled to recover damages as a dependent. We reverse and vacate the award to Mahalek accordingly.

KAL further argues that the evidence submitted by Zicherman is insufficient to satisfy the test stated above. In contrast to Mahalek, Zicherman testified to generous financial assistance from Kole, including an offer to finance Zicherman's purchase of a house. Yet the record does not establish that Kole in fact financed such a purchase. Presented with such evidence, the jury could find the test of dependency satisfied, but it also could find this test not satisfied. We reverse and remand the award of loss of society damages to Zicherman, pending trial of this issue.

III.

Although federal maritime law permits dependent survivors to recover damages for loss of decedent's society, it precludes survivors from recovering additional damages for their grief or mental injury. *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618, 622 (1978); *Gaudet*, 414 U.S. at 585-86 n.17. Nonetheless, the district court determined that this rule was inapplicable to Warsaw Convention cases. *In re Korean Air Lines Disaster of September 1, 1983*, 807 F.Supp. at 1085-86. The court reasoned that the Warsaw Convention permits recovery for "damages sustained," and that the mental injury or grief of surviving relatives is one such species of damages.

We disagree. As we stated in *Lockerbie II*, federal maritime law supplies the measure of damages for injuries arising out of accidents governed by the Warsaw Convention. As federal maritime law does not permit surviving relatives to recover damages for mental injury or grief in addition to damages for

loss of society, we reverse and vacate the awards to Zicherman and Mahalek for mental injury.

IV.

In order to recover for Kole's pre-death pain and suffering, Zicherman, as executrix, was required to provide evidence from which the jury could infer that Kole: (1) survived the missile explosions; (2) was conscious and aware for a period of time; and (3) experienced pain and suffering. To support the claim, Zicherman introduced the testimony of Foody and Elzy.

KAL contends that Zicherman did not satisfy her evidentiary burden because she offered no direct evidence on any of these points, and that the expert testimony was mere generalized testimony concerning the possible effects of a missile strike on a passenger-filled Boeing 747 flying at 35,000 feet. We disagree. Eyewitness testimony as to decedent's pain and suffering is not essential to recovery in fatal aircraft accidents, because such evidence "is difficult if not impossible to obtain." *Shatkin* v. *McDonnell Douglas Corp.*, 727 F.2d 202, 206 (2d Cir. 1984). Obviously, it was impossible to produce such evidence in this case. Plaintiffs satisfied their burden by providing circumstantial evidence from which "it can reasonably be inferred that the passenger underwent some suffering before the impact." *Id.* A jury which accepted Foody and Elzy's testimony could reasonably infer that Kole remained conscious for a period of up to twelve minutes after the missile strike, during which time she experienced intense, decompression-induced pain. We affirm the award to Zicherman, as executrix of Kole's estate, for Kole's pre-death conscious pain and suffering.

V.

Damages for loss of support and loss of inheritance are well-recognized wrongful death remedies under maritime law. *See Gaudet*, 414 U.S. at 584 & n.11; *Nygaard* v. *Peter Pan Seafoods, Inc.*, 701 F.2d 77, 80 (9th Cir. 1983). However, courts generally have conditioned such awards on a showing of full or partial dependency. *See, e.g., Wahlstrom*, 4 F.3d at 1093 ("Loss of support or services is compensable, but only to the extent that the [non-dependent parents] anticipated future pecuniary benefits from support or services to be rendered to them by their deceased son."); *Evich* v. *Connelly*, 759 F.2d 1432, 1433-34 (9th Cir. 1985) (denying recovery for pecuniary loss to non-dependent siblings); *In re DFDS Seaways (Bahamas) Ltd.*, 684 F.Supp. 1160, 1165 (S.D.N.Y. 1988) (parent who alleges partial dependency on decedent states claim for loss of support or services). Accordingly, we reverse and remand the awards to Zicherman for loss of support and loss of inheritance for determination of the issue of dependency.

VI.

In *Jones & Laughlin Steel Corp.* v. *Pfeifer*, 462 U.S. 523 (1983), the Supreme Court recognized that courts may discount damages to their present value to reflect the impact of inflation on future wages and prices. Traditionally, courts have used this technique in connection with awards to reflect foregone future wages or other future loss. *See, e.g., Chiarello* v. *Domenico Bus Service, Inc.*, 542 F.2d 883, 886 & n.4 (2d Cir. 1976). The district court discounted the entire award to the date of the accident, including that portion reflecting plaintiffs' loss between the date of the accident and the jury verdict, as a precursor to awarding prejudgment interest. We are not persuaded by the plaintiffs that the court should have discounted

only that portion of the award reflecting future loss from the date of the verdict.

The calculation of the prejudgment interest is a discretionary matter for the district court. *United States* v. *Seaboard Surety Co.*, 817 F.2d 956, 966 (2d Cir.), *cert. denied*, 484 U.S. 835 (19876). A jury verdict rendered in 1992 for an accident that occurred in 1983 may well reflect the inflationary impact of the intervening nine years; the court did not abuse its discretion. We affirm the district court's calculation of prejudgment interest.

The award to Zicherman as executrix of Kole's estate for Kole's pre-death pain and suffering and the court's calculation of prejudgment interest are affirmed. The awards to Zicherman and Mahalek for mental injury and the award to Mahalek for loss of society are reversed and vacated. The awards to Zicherman for loss of society, loss of support, and loss of inheritance are reversed and remanded for proceedings consistent with this opinion.

APPENDIX B.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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83 Civ. 8428 (CBM)

In re Korean Air Lines
Disaster of September 1, 1983

Amended Opinion
On Pre-Trial
Motions

November 20, 1992

This case arises out of the tragic downing of Korean Air Lines Flight KE007. On September 1, 1983, while the plane was enroute from New York to Seoul, South Korea, the plane strayed into Soviet airspace and was show down by Soviet military aircraft over the Sea of Japan. All 269 persons aboard were killed. Muriel A.M.S. Kole was among those who perished. Muriel Mahalek, her mother, and Marjorie Zicherman, her sister and executrix of her estate, are among the many surviving relatives who filed suit to recover damages under the Warsaw Convention which applies specifically to such airline disasters and to which the United States is a party.[1]

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[1] Convention for the Unification of Certain Rules Relating to International Transportation by Air, *done* at Warsaw, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 (1934), *reprinted at* 49 U.S.C.App. § 1502. The Warsaw Convention was supplemented by the Montreal Agreement, Agreement Relating to Liability Limitations of the Warsaw Convention and The Hague Protocol, CAB Agreement 18900, note following 49 U.S.C.App. § 1502 (approved by CAB Order E-23680, May 13, 1966, 31 Fed. Reg. 7302). Typically, airplane crash damages recovery under the Warsaw Convention is restricted by the $75,000 cap of the Montreal Agreement. However, where there is a finding of "wilful misconduct," as in this case, the cap does not apply.

BACKGROUND

All federal court actions in the United States arising out of this disaster were transferred in 1983 to the United States District Court for the District of Columbia (Chief Judge Aubrey E. Robinson, Jr.) for coordinated and consolidated proceedings on the common liability issues.

The common liability issues — whether the destruction of Flight KE007 by Soviet military aircraft was proximately caused by the "wilful misconduct" of KAL or its employees within the meaning of Article 25 of the Warsaw Convention and whether punitive damages are recoverable — were tried to a jury in the District of Columbia. The jury returned a verdict finding that the downing of Flight KE007 and the deaths of all on board were proximately caused by the "wilful misconduct" of the flight crew of Flight KE007 and assessed punitive damages against KAL. Individual compensatory damages were to be separatedly determined. The Court of Appeals for the District of Columbia Circuit upheld the jury finding of "wilful misconduct." However, it vacated the punitive damages award, holding that the Warsaw Convention does not permit the recovery of punitive damages. *In re Korean Air Lines Disaster of September 1, 1983*, 932 F.2d 1475 (D.C. Cir. 1991), *cert. denied*, 112 S.Ct. 616, 116 L.E.2d 638 (1991) ("*In re Korean Air Lines*"). *Accord In re Air Disaster at Lockerbie, Scotland*, 928 F.2d 1267 (2d Cir.), *cert. denied*, ___ U.S. ___, 112 S.Ct. 331 (1991) ("*Lockerbie*"). Plaintiffs and KAL each filed a petition for a writ of certiorari. Both petitions were denied by the United States Supreme Court on December 2, 1991. *Dooley* v. *Korean Air Lines Co., Ltd*, ___ U.S. ___, 112 S.Ct. 616, 116 L.Ed.2d 272 (1991). The common liability issues having been determined (*i.e.*, the existence of Article 25 "wilful misconduct" which lifts the otherwise applicable $75,000 cap on damages in airline crashes and the

non-recoverability of punitive damages), these cases were remanded by the Judicial Panel on Multidistrict Litigation to the original transferor courts for trial of issues relating to compensatory damages and by whom recoverable.

Plaintiffs' and Defendant's Claims Regarding Damages

The instant case is now before this court for trial on the issue of compensatory damages sought by decedent's mother and sister in their individual capacities and by the sister as the executrix of decedent's estate for the benefit of the estate and its beneficiaries. Plaintiffs' amended complaint in this action seeks recovery of damages under the Warsaw Convention or the Death On the High Seas Act ("DOHSA").[2] Plaintiffs seek to recover for both pecuniary and non-pecuniary losses under the Warsaw Convention or, in the alternative, pecuniary losses under DOHSA.

Plaintiffs' contend that the Warsaw Convention creates a cause of action for injuries sustained in favor of any person who has suffered any loss whether pecuniary or non-pecuniary as a result of an airplane accident or disaster. Decedent's mother seeks damages for mental anguish and grief associated with her daughter's death as well as loss of love, affection, and companionship. Decedent's sister also seeks damages for such losses in her individual capacity. As executrix of her deceased sister's estate, the sister seeks to recover for decedent's conscious pain and suffering before her death on the plane and loss of the quality or enjoyment of life as well as loss of support, loss of services, and loss of inheritance for herself and decedent's mother.

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[2] Death On the High Seas Act, 46 U.S.C. § 761 *et seq*. Plaintiffs claim that they amended their complaint to include DOHSA as alternative pleading in the event that the measure of damages was held to be limited by DOHSA under the Warsaw Convention as alleged by defendant.

Defendant's basic claim is that plaintiffs are limited to an action brought by decedent's estate for decedent's wrongful death caused by the plane disaster, a cause of action provided for by the DOHSA, and the recovery of pecuniary losses only as provided by DOHSA. *Miles* v. *Apex Marine Corp.*, 498 U.S. 19, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990). Defendant has made several pre-trial motions alleging the procedural and substantive impact of DOHSA. DOHSA, enacted by the Congress in 1920 to provide specifically for a remedy in admiralty for the dependent survivors of seamen for wrongful death on the high seas, applies only when death occurs on the high seas more than a marine league (3 miles) from the shore of any state, the District of Columbia, or any territory of the United States and has been construed by the Supreme Court to limit dependent survivors' losses to pecuniary losses. *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618, 622-23, *reh'g denied*, 439 U.S. 884 (1978); *Miles*, 112 L.Ed.2d at 290.

Parties Pre-Trial Motions

Accordingly, defendant moves to: 1) strike plaintiffs' jury demand; 2) limit the determination of damages to those available under DOHSA; 3) dismiss decedent's mother, Muriel Mahalek, as a party plaintiff; 4) preclude the testimony of plaintiffs' economist with respect to lost future wages of decedent; 5) dismiss claims for decedent's pre-death pain and suffering; 6) preclude the testimony of experts relevant to this issue; 7) preclude recovery for plaintiffs' grief, mental distress, and loss of decedent's love and companionship; and 8) exclude any reference to and evidence of "wilful misconduct" on the part of KAL as found by the jury in the joint liability trial.

Plaintiffs seek additional recovery for decedent's loss of the quality and enjoyment of life and have moved to exclude the testimony of decedent's husband, Michael Kole.

Summary Of This Court's Holdings On The Parties Motions

This court holds that plaintiffs are entitled to a jury trial; that the determination of damages and by whom recoverable under the Warsaw Convention are not limited by DOHSA; that survival actions are permitted under the Warsaw Convention; that the estate may recover for decedent's conscious pain and suffering prior to her death; that the estate cannot recover for decedent's loss of the quality or enjoyment of life; that estate may recover for loss of support, lost services and loss of inheritance for any dependent survivors or beneficiary of the estate; that the individual non-dependent plaintiffs suing in their individual capacities may recover for mental injury connected to physical injury, loss of love and affection, lost inherintance, and lost services. Muriel Mahalek may, therefore, proceed as a party plaintiff. The testimony of Michael Kole, decedent's husband, a non-party, will be excluded as too prejudicial. References to the prior jury's finding of "wilful misconduct" where relevant will not be excluded, and the inability to impose punitive damages will be part of the court's instructions to the jury.

Law Applicable To Warsaw Convention Cases

The Warsaw Convention is a treaty signed by many nations, including the United States. It was ratified by the Senate as required by the Constitution. U.S. CONST. art II, § 2. It is thus the Supreme law of the land. *See Lockerbie*, 928 F.2d at 1278. The Second Circuit in *Lockerbie* held that the Warsaw Convention is a federally-created cause of action, preempting all state causes of action, and must be construed exclusively under federal common law. *See also In re Inflight Explosion on Trans World Airlines, Inc. Aircraft Approaching Athens,*

Greece on April 2, 1986, 778 F.Supp. 625, 629 (E.D.N.Y. 1991), *rev'd on other grounds*, 1992 WL 212001 (2d Cir. 1992) ("*Inflight Explosion*"). The Warsaw Convention, after providing for suit for "damages sustained" (Warsaw Conv., art. 17) by passengers or their "survivors" (*In re Korean Air Lines*, 932 F.2d at 1485-86), provides that questions as to who are the persons who have the right to bring suit and what are their respective rights, measure of damages, as well as procedural questions, shall be determined by the national law of the court where suit is brought, Warsaw Convf., art. 24(2). *Lockerbie*, 928 F.2d at 1283. Therefore, the determination of the issues brought on by defendant's motions are governed by federal law and since the Warsaw Convention, the source of plaintiffs' causes of action, is a federal statute, in construing that statute, federal courts must look to, apply, and develop federal common law. *Lockerbie*, 928 F.2d at 1278-79.

RIGHT TO A JURY

Defendant claims that there is a federal statute, DOHSA, which provides the exclusive remedy in this case under the Warsaw Convention. Defendant also argues that DOHSA is an action which can only be heard by this court sitting in admiralty without a jury, since juries are not available in admiralty. *Waring* v. *Clarke*, 46 U.S. 441, 464 (1847) ("civil causes of admiralty and maritime jurisdiction shall not be tried by a jury"); *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 371 n.28 (1959), *reh. den.*, 359 U.S. 962, 79 S.Ct. 795, 3 L.Ed.2d 769 (1959) (no jury right in admiralty). Defendant thus moves to strike plaintiffs' jury demand. Defendant's motion to strike plaintiffs' jury demand is denied.

Sincef it has been determined, by the Second Circuit, that the applicable law is the Warsaw Convention, a federal statute,

which must be construed in the light of federal law, we must first look to the statute. The Warsaw Convention neither provides for nor bars jury trials in cases arising under it. Since Congress has not provided that Warsaw Convention claims be tried by jury and has not barred juries in such cases, we must look to federal common law and other federal statutes for guidance. DOHSA is only one such federal statute. Both the Federal Employers Liability Act ("FELA")[3] and the Jones Act[4] contemplate jury trials in negligence, survival, and wrongful death cases for railroad employees and seamen, respectively. In Civil Rights Cases and *Bivens*-type cases,[5] juries are allowed where damages are sought for violations of constitutional and civil rights.[6] Congressional policy and federal common law thus seem to favor jury trials in personal injury and wrongful

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[3] Federal Employees Liability Act, 45 U.S.C.S. §§ 51 *et seq.* (1992).

[4] 46 U.S.C. App. § 688(a) (Supp. 1991). The Jones Act provides a cause of action against shipowners for their negligence when a seaman is injured on board:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law . . .; and in case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law. . . .

Id.

[5] In *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), the Supreme Court held that a cause of action existed to recover money damages for violations of constitutional rights by federal officials.

[6] *Carlson* v. *Green*, 446 U.S. 14, 100 S.Ct. 1468, 64 L.Ed.2d 15 (1980) (*Bivens* remedy, allowing jury, available even though suit could have been brought under Federal Tort Claims Act ("FTCA"), which does not permit jury trial). *See also Anderson* v. *Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) (suit for damages against FBI agents for violation of Fourth Amendment rights decided by jury); *Jett* v. *Dallas Independent School District*, 491 U.S. 701, 109 S.Ct. 2702, 105 L.Ed.2d 598 (1989) (school teacher's damage claims against superintendent and principal under 42 U.S.C. § 1981 and § 1983 decided by jury); *Memphis Community School Dist.* v. *Stachura*, 477 U.S. 229, 106 S.Ct. 2537, 91 L.Ed.2d 249 (1986) (school teacher's claims for compensatory and punitive damages under § 1983 decided by jury).

death cases, and Congress has not proscribed jury trials under the Jones Act, which provides for a seaman's action at law, notwithstanding the fact that he might have brought an action in admiralty to recover for his injuries. *Miles*, 112 L.Ed.2d at 285-88.

Applying DOHSA strictly to exclude jury trials would impair the national uniformity which the Second Circuit says the Warsaw Convention was intended to create. *Lockerbie*, 928 F.2d at 1270. If DOHSA strictly applied to preclude jury trials, then international airplane accidents occurring on the high seas would not be tried by a jury while international accidents not occurring on the high seas could be tried before a jury. National uniformity requires that all Warsaw Convention cases be tried before juries.

The jury trial issue in Warsaw Convention cases was expressly raised and decided by Chief Judge Robinson in this case in *In re Korean Air Lines Disaster of September 1, 1983*, 704 F.Supp. 1135 (D.D.C. 1988) ("*Korean I*") and *In re Korean Air Lines Disaster of September 1, 1983*, MDL No. 565, Nos. 83-2793 *et al*, F.Supp. ___, 1992 WL 20043 (April 1, 1992) ("*Korean II*") and is, therefore, the law of the case. *See also Yun v. Korean Air Lines*, ___ F.Supp. ___, 1992 WL 184395 (E.D.N.Y. 1992) (jury trial is law of the case and jury trial available under Warsaw Convention even where DOHSA also applies). It was a jury in the District of Columbia that decided that KAL was guilty of "wilful misconduct" and awarded punitive damages. KAL, by not raising the jury trial issue in this Warsaw Convention case on appeal, waived its right to a non-jury trial if it is in fact entitled to trial without a jury. The instant trial sought here on compensatory damages is not a new action. It is the second part of a bifurcated case. The fact that Chief Judge Robinson has certified the jury trial issue to the D.C. Circuit Court of Appeals in the compensatory damages trials now before him in other similar cases is simply irrel-

evant to whether KAL waived its right to a non-jury trial in this case by not raising the question on appeal.

In *Korean I*, as here, plaintiffs alleged their claims at law and did not plead their claims in admiralty according to Fed.R. Civ.P. 9(4). *Korean I*, 704 F.Supp. at 1151. There, as here, KAL relied primarily upon *Higginbotham*, 436 U.S. 618 (1978) and *Offshore Logistics, Inc.* v. *Tallentire*, 477 U.S. 207, 91 L.Ed.2d 174 (1986). Chief Judge Robinson ruled, however, that neither case specifically addressed the question of the right to a jury in Warsaw Convention cases and that "the law of the court" in a Warsaw Convention case was not limited to DOHSA. *Korean I*, 704 F.Supp. at 1152. The latter ruling is also the law of this case.

Chief Judge Robinson also concluded, by reference to DOHSA's legislative history, that Congress did not intend to eliminate the right to a jury whenever DOHSA also applies to the facts of a case. *Id.* In *Korean II*, the court also specifically noted that the Supreme Court, long ago, had approved the hearing of all claims a seaman might have in both law and admiralty in a single trial before a jury. *Korean II*, 1992 WL 200431 at 4-5 (citing *Fitzgerald* v. *United States Lines Co.*, 374 U.S. 16 (1963) and *Moragne* v. *State Marine Lines, Inc.*, 398 U.S. 375 (1970)). In *Korean II*, the court concluded:

> it cannot be said that jury trials are repugnant to the DOHSA scheme, at least where there are concurrent claims triable by the jury joined with the DOHSA claim

Korean I, 704 F.Supp. at 1152. Consequently, DOHSA does not preclude jury trial where there is other applicable law — *e.g.*, the Warsaw Convention, itself.

The proper question, then, is "whether the law of th[e] court provides for a jury trial in wrongful death actions brought under

the Warsaw Convention." *Id.* at 1153. Chief Judge Robinson answered this question affirmatively. *Id.* at 1153. *See also In re Air Crash Disaster Near Honolulu, Hawaii*, 783 F.Supp. 1261, 1265 (N.D. Cal. 1992) ("*Hawaii II*") (claims under Warsaw Convention are triable by jury). It should also be noted that long before Chief Judge Robinson and the Court in *Hawaii II* made their rulings, a judge of this court determined that when plaintiffs bring Warsaw Convention claims as well as DOHSA claims, the right to a jury trial is not precluded. *In re Air Crash Disaster in the Ionian Sea on September 8, 1974 and All Other Related Actions*, MDL Docket No. 229, slip op. (S.D.N.Y. Apr. 10, 1979).

DAMAGES

Plaintiffs seek to recover money damages for decedent's conscious pain and suffering prior to death, for decedent's loss of the quality and enjoyment of life, and for decedent's future lost wages. They also seek to recover for their own personal mental anguish and grief, for their own personal suffering due to the loss of decedent's love and affection, for loss of support, lost inheritance, and lost services. Plaintiffs, therefore, claim personal damages, damages for wrongful death which are both pecuniary and non-pecuniary, and damages in a survival action on behalf of decedent's estate.

MURIEL MAHALEK AS PARTY PLAINTIFF

Defendant moves to dismiss Muriel Mahalek as a party plaintiff suing in her own right. Defendant argues that under DOHSA only the personal representative of the decedent's estate is permitted to bring a wrongful death action and is limited to

pecuniary losses. This court, however, has determined that actions under the Warsaw Convention are not restricted by DOHSA. The Warsaw Convention provides that suit for "damages sustained" may be brought "however founded" and "without prejudice to the questions as to who are the persons who have the right to bring suit." Warsaw Conv. art. 24(2) The Warsaw Convention, as the D.C. Circuit noted, does not limit recovery to the personal representative of the decedent and affirmatively provides for suit by persons other than passengers. *In re Korean Air Lines*, 932 F.2d at 1485-86. Therefore, defendant's motion is denied. Muriel Mahalek may proceed as a party plaintiff and if she can prove any personal loss, as allowed by this decision, may recover for same.

SURVIVAL ACTION

Decedent's Pain and Suffering

Defendant in moving to limit plaintiffs' recovery to pecuniary losses sustained by decedent's dependent survivors argues that DOHSA does not provide for survival actions brought to recover for conscious pain and suffering, a non-pecuniary loss. Defendant's motion is denied.

In *Eastern Airlines, Inc.* v. *Floyd*, ___ U.S. ___, 111 S.Ct. ___, 113 L.Ed.2d 569 (1991), the Supreme Court addressed the question whether purely mental injuries were compensable under the Warsaw Convention's language allowing recovery for *lesion corporelle* -- bodily injury. Plaintiffs in that case sought damages for mental distress when their plane narrowly avoided crashing during a flight between Miami and the Bahamas. The Court held that a passenger's injury caused by anxiety or shock is not recoverable when unaccompanied by physical injury.

It, therefore, logically follows that where there is physical injury, passengers, who plainly may bring a cause of action under the Warsaw Convention, may recover for injuries which accompanied such physical injuries. Plaintiffs intend to prove that the passengers aboard the ill-fated Flight KE007 were alive for a period of time after their plane was disabled by a Soviety plane's gunfire or missile and that the passengers suffered conscious physical pain and mental terror and anguish prior to their deaths. While the Court in *Floyd* expressly refused to consider the question whether conscious pain and suffering are recoverable in a survival action, since that was not the case before them, the Eastern district, since then, has considered the issue and has determined that damage awards for conscious pain and suffering sought in a survival action are provided for under the Warsaw Convention. *In re Inflight Explosion on Trans World Airlines*, 778 F.Supp. 625 (E.D.N.Y. 1991), *rev'd on other grounds*, 1992 WL 212001 (2d Cir. 1992), involved a terrorist attack on TWAA Flight 840. A jury determined that TWA's failures to take proper security measures were equivalent to "wilful misconduct." *Inflight Explosion*, 778 F.Supp. at 626. In considering the issue of damages for conscious pain and suffering to the passengers, the court in *Inflight Explosion* noted that DOHSA did not preclude recovery for consicous pain and suffering in Warsaw Convention cases:

> the process of fashioning federal common law under the Warsaw Convention does not actually involve applying the DOHSA. Thus, the DOHSA cannot be used to inhibit federal courts from recognizing a survival action under federal Warsaw Convention treaty common law or general maritime law.

Id. at 636. Citing the court's decision in *Lockerbie*, the court in *Inflight Explosion* affirmed plaintiffs' right to recover dam-

ages for the pain and suffering of the passengers because recovery for such conscious pain and suffering redresses actual harm, *dommage survenu* (damage sustained), as required under the Warsaw Convention, rather than generalized legal damages such as punitive damages. *Id.* at 636. This court sees no federal statutory or common law bar to the survival action brought by decedent's estate here to recover damages for decedent's conscious pain and suffering prior to her death. *See also In re Air Crash Disaster Near Honolulu, Hawaii*, 783 F.Supp. 1261, 1265) (N.D.Cal. 1992) ("*Hawaii II*") (considering the interplay of DOHSA and Warsaw Convention and concluding that "[p]laintiffs asserting causes of action on behalf of decedent passengers may recover for the pre-death pain and suffering of the decedent under the cause of action created by Article 17 of the Warsaw Convention.")

Additionally, defendant's motion to preclude the expert testimony of Robert L. Elzy and James F. Foody, neither of whose qualifications have not been questioned, is denied because Mr. Elzy's and Mr. Foody's testimony is relevant to this issue.

Loss Of The Enjoyment Of Life

Plaintiffs seek to recover for loss of the enjoyment of life as part of their survival action on behalf of the decedent's estate. Plaintiffs claim that federal courts have allowed damages for lost enjoyment of life as hedonic damages.[7] As support for this proposition, plaintiffs cite only one Circuit Court opinion, *Bell* v. *City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984) (*citing Guyton* v. *Phillips*, 532 F.Supp. 1154 (N.D.Cal. 1981) *and Heath* v. *City of Hialeah*, 560 F.Supp. 840 (S.D.Fla. 1983)).

[7] "Hedonic damages" refers to damages for the loss of the enjoyment of life as affected by physical pain and suffering, physical disability, impairment and inconvenience affecting an individual's normal pursuits and pleasures of life.

Bell involved an unlawful killing by Officer Grady of the Milwaukee Police Department and a conspiracy to conceal the facts surrounding the shooting by several other police officers. Suit was brought under 42 U.S.C. §§ 1981, 1983, 1985 and 1986 against Officer Grady and the other officers who participated in the cover-up. Plaintiffs brought survival actions on behalf of the decedent Bell's estate and wrongful death actions in their individual capacities. Plaintiffs claimed that Officer Grady and the other officers had 1) violated Bell's Fourth and Fourteenth Amendment rights through the use of excessive force and unlawful killing; 2) violated the Fourteenth Amendment rights of Bell's father, Dolphus Bell, by depriving him of an alleged liberty interest in the continued association with his son; 3) violated similar Fourteenth Amendment liberty and associational rights of Bell's siblings, and 4) violated the due process and equal protection rights of Bell's estate and siblings by conspiring to conceal the facts of the shooting.

The Seventh Circuit in *Bell* determined that Wisconsin statutory law creates a survival action in favor of a decedent's estate for *pre-death* injuries and a wrongful death action in favor of the decedent's survivors, but neither of these remedies allow recovery of damages for loss of life. *Bell*, 746 F.2d at 1236. Nevertheless, the court went on to determine that where state law is inconsistent with federal civil rights laws, state law should not apply; therefore, Wisconsin law could not "be applied to preclude the estate's recovery for loss of life . . ." *Bell*, 746 at 1236. The court noted that state law does not preclude damages for constitutional violations claimed under § 1983 because "[i]t is axiomatic that the Fourteenth Amendment protects individuals from deprivation by the *state* of life without due process." *Bell*, 746 F.2d at 1238 (citation omitted) (emphasis added). As a result, the court concluded that Section 1983 permits recovery for loss of life by the decedent's estate notwithstanding restrictive state laws. *Bell*, 746 F.2d at 1238.

The court's decision in *Bell* was inextricably linked to constitutional violations by state actors. The court noted that "the fundamental policies behind Section 1983 are twofold: compensation for and deterrence of unconstitutional acts committed under state law. One of the primary reasons Section 1983 was enacted was to remedy and deter racial killings and other acts violative of the Fourteenth Amendment." *Bell*, 746 F.2d at 1239 (citations omitted). The facts of *Bell*, § 1983 claims for constitutional violations by state actors, make it irrelevant to the case at hand.

Plaintiffs in this case also refer to two district court cased cited in *Bell*; *Guyton* v. *Phillips*, 532 F.Supp. 1154 (N.D.Cal. 1984) and *Heath* v. *City of Hialeah*, 560 F.Supp. 840 (S.D.Fla. 1983). Both of these cases also involved § 1983 actions brought against police officers for unlawful killings resulting in a deprivation of life without due process in violation of the Fourteenth Amendment to the Constitution. Plaintiffs here make no claims against state actors and no claims of violations of constitutional rights. While a survival action for loss of life may exist under § 1983 which protects against unconstitutional deprivations of life by state officials, defendant here is not related to any state and therefore not susceptible to the type of due process claims made in *Bell*.

In the context of some personal injury suits, courts have permitted recovery for loss of the quality or enjoyment of life. This recovery, however, has been allowed in non-death cases involving permanent injury because loss of the quality or enjoyment of life in sujch cases concerns loss which will be sustained during a victim's lifetime, and damages for such losses have been available to the victim, not as damages recoverable by a decedent's estate in a survival action. For example, in *Walsh* v. *Matthews Chrysler Leasing*, ___ F.Supp. ___, 1990 U.S. Dist. Lexis 13149 (September 29, 1990), a court in the Northern District of New York awarded damages for loss

of the quality of life to a teacher who had been injured in an automobile accident. The court found that Walsh had lived an active life before the accident, teaching classes, as well as bowling, golfing, gardening, and dancing. After the accident, however, she had experienced significant pain and had been unable to pursue these activities. Accordingly, the court awarded damages for loss of the quality of life as well as for pain and suffering and pecuniary damages. *Walsh*, 1990 U.S. Dist. Lexis 13149 at 9-12. *Poleto* v. *Consolidated Rail Corp.*, 826 F.2d 1270 (3d Cir. 1987) involved a FELA claim brought by a rail car inspector who was injured when he fell through rotted floorboards of a rail car. The Third Circuit Court affirmed the District Court's award of damages for the separate categories of "loss of quality or enjoyment of life from the date of the accident to the date of the verdict" and "future loss of quality or enjoyment of life" as well as pecuniary damages. *Poleto*, 826 F.2d at 1273 n.3. In *Christopher* v. *United States*, ___ F.2d ___, 1991 U.S.App. Lexis 7825 (April 23, 1991), the Ninth Circuit remanded the District Court's reduction of a general damage award in a personal injury suit. The court specifically instructed that the general damage award was to be apportionerd between "losses for physical impairment and disfigurement and losses for pain and suffering, inconvenience, emotional stress, and *impairment of quality of life*." *Christopher*, 1991 U.S.App. 7825 at 4 (emphasis added).

All of these cases involved plaintiffs, suing on their own behalf, for injuries to be suffered during their lifetimes. Loss of the quality or enjoyment of life is not a claim that has typically survived the victim in cases other than Civil Rights Cases as noted above. Therefore, Plaintiffs may not recover damages for loss of the quality or enjoyment of life of the decedent.

Future Lost Earnings

Defendant moves to deny recovery for lost future wages. Plaintiffs claim that the broad language of the Warsaw Convention which provides for recovery of "damage sustained" permits them to recover in a survival action for the wages that decedent would have earned but for the KE007 disaster.

On the other hand, defendant, relying on *Miles*, argues that recent Supreme Court precedent precludes the recovery of future lost earnings by decedent's relatives in this case. While defendant is correct that under *Miles* lost wages may not be recovered in wrongful death actions by survivors of a seaman, lost earnings may be proved for the purpose of determining loss of support and loss of inheritance.

In *Miles* v. *Apex Marine Corp.*, 498 U.S. 19, 111 S.Ct. 317, 113 L.Ed.2d 275 (1990), the mother of a seaman who had been stabbed by a fellow crew member while the ship was docked in the harbor sought to recover damages on behalf of her son's estate and herself. Her action could not be brought under DOHSA which applies only to death on the high seas. The Court's decision in *Moragne* found that a longshoreman could bring a wrongful death action under the general maritime law and recover for loss of society. But Ms. Miles' son was not a longshoreman. In resolving this issue, Justice O'Connor traced the history of survival and wrongful death actions for seamen and longshoremen. She discussed the inconsistency of remedies that had existed due to the interplay of statutory and common law rights in maritime cases. These inconsistencies were thought to have been resolved by the Court's decision in *Moragne*, giving longshoremen's survivors the right to bring an action under general maritime law for wrongful death when a longshoreman lost his wife within the three mile zone. Adopting the reasoning in *Moragne*, the Court in *Miles* declared the availability for the survivors of seamen, who lost their lives

within the three mile zone, of a general maritime cause of action for wrongful death. *Miles*, 112 L.Ed.2d at 289. However, loss of society damages were ruled out for all seamen and longshoremen in the interest of uniformity.

Despite the general maritime cause of action for wrongful death, however, the Court declined to decide whether survival actions may be brought under a general maritime cause of action. Instead, the Court addressed the narrower question of whether future lost earnings are recoverable by a seaman's estate, finding that there is no recovery for lost earnings beyond a seaman's lifetime.

Justice O'Connor concluded that recovery for lost future income there are dependent survivors of a seaman would often be duplicative of recovery for future loss of support. *Miles*, 112 L.Ed.2d at 292. Moreover, the Court noted that a large majority of states preclude recovery for lost future income in survival actions. *Miles*, 112 L.Ed.2d at 293. The Court also concluded that the cause of action for the wrongful death of a seaman created by DOHSA and the Jones Act does not include recovery for lost future earnings. *Miles*, 112 L.Ed.2d at 292.

Miles, however, is not direct precedent in this case. The Court in *Miles* merely sought to create uniformity in the remedies available to seamen and longshoremen. The Court considered the remedies made available by Congress in DOHSA, the Jones Act, and general maritime law and formulated a rule regarding remedies available to the survivors of seamen and longshoremen that would be uniform. The relevant substantive law in this case, as discussed above, is federal common law. While this court may consider DOHSA, the Jones Act, general maritime law, and the Court's decision in *Miles* as analogies, they are not directly relevant or binding. The causes of action created by the Warsaw Convention are broader than either DOHSA or the Jones Act. However, this court finds that where

there are surviving dependents, as here, who are entitled to seek loss of support, lost inheritance, and loss of services, as in this case, the argument against double recovery is persuasive. The court, therefore, rules that under the facts of this case lost future wages are not recoverable. Even if plaintiffs were not suing for loss of support, as they are now trying to do by advising the court in their supplemental brief on damages that they are not now seeking loss of support, the amount of lost future wages they might recover, as defendant points out, would be subject to reduction by the amounts which the jury finds decedent would have required for her own support and income taxes which she would have had to pay on future lost wages, the same as in loss of support cases. Plaintiffs, therefore, may not be any better situated in seeking lost future wages in lieu of loss of support, loss of inheritance, and loss of services.

WRONGFUL DEATH ACTION

Loss of Support

While plaintiffs in this case may not recover for lost future earnings, they may recover for loss of support. *Sea-Land Services, Inc.* v. *Gaudet*, 414 U.S. 573, 584, 94 S.Ct. 806, 39 L.Ed.2d 9 (1974), *rev'd on other grounds*, 498 U.S. 19 (1990) ("recovery for loss of support has been universally recognized"). The court in *Evich* v. *Morris*, 819 F.2d 256, 258 (9th Cir. 1987), *cert. denied*, 484 U.S. 914 (1987) noted that most states allow recovery in the form of loss of support, when wrongful death beneficiaries exist, rather than recovery for future lost wages. *Evich* involved non-dependent brothers of a deceased seaman who filed actions against the owner of the decedent's vessel and the owner of the vessel which attempted to rescue the decedent's vessel. On appeal, the court addressed

the question of whether a general federal maritime survival action preempts state law and what damages are recoverable in the federal action.

The court in *Evich* awarded damages for lost future earnings. The court reasoned that the award would prevent the anomaly of making it cheaper to kill a victim rather than simply injuring him. The award of lost future earnings, however, was specific to the facts of *Evich* where there were no dependent survivors entitled to recover for loss of support (here there are) and, therefore, no possibility of duplicative recovery — recovery for loss of support and lost future wages. *See Miles*, 112 L.Ed.2d at 292. On the other hand, where dependents do exist, the *Evich* court recognized that most states award damages for loss of support and do not allow damages for future economic loss. *See also O'Rourke* v. *Eastern Air Lines, Inc.*, 730 F.2d 842 (2d Cir. 1984) (In action against airline under Warsaw Convention and against Government, court granted damages for loss of support in cliam against Government under the Federal Tort Claims Act). This court finds that under the facts of this case, damages for loss of support and loss of inheritance are recoverable, and future lost earnings and wages are provable to furnish a basis for determining those losses. Loss of support includes: regular contributions of money and periodic gifts. Defendant does not dispute the provability of future lost wages to serve the determination of loss of support and loss of inheritance.

The criteria for recovery for loss of support are the following: the decedent's age, health and life expectancy, her financial expectations and prospects for advancement, her earning ability and actual income, her living expenses and income taxes, her past actual financial contributions to the beneficiaries, as well as the number, age, and situation of those dependent on her for support, and the manner in which she would have supported them.

Because the appropriate criteria for assessing damages for loss of support are set forth above, defendant's motion to preclude the expert testimony of plaintiffs' economist, Conrad Berenson, is denied. Defendant claims that the information provided in discovery is not a sufficient basis from which plaintiffs' economist can testify as to future earnings. However, Mr. Berenson, whose qualifications are not questioned, would be able to testify as to loss of support based on the criteria set forth above. Therefore, defendant's motion to exclude the testimony of plaintiffs' economist is denied.

Plaintiffs' Mental Injury and Grief

Plaintiffs seek damages for their own personal mental anguish in grieving for their deceased daughter and sister. Defendant's again claim that DOHSA does not permit recovery for plaintiffs' grief in a wrongful death action. Generally, there is no recovery for mental anguish in grieving in a wrongful death action. Federal common law has traditionally not allowed recovery for grief. *Miles*, 112 L.Ed.2d at 291. *But see Diaz Lugo* v. *American Airlines, Inc.*, 686 F.Supp. 373 (D. Puerto Rico 1988) (allowing husband's recovery under the Warsaw Convention for emotional distress and loss of consortium for injury to his wife). As the Supreme Court noted in *Miles*, Lord Campbell's Act[8] was passed in England in 1846 to remedy the absence of a right of action for wrongful death. *Miles*, 112 L.Ed.2d at 290. The Act was the progenitor of many wrongful death statutes in the United States. In one of the early English decisions on this matter, Justice Coleridge commented that the title of Lord Campbell's Act appropriately fit its meaning: " An act for compensating the families of persons killed,' not for

[8] Lord Campbell's Act, 9 & 10 Vic. ch. 93 (1846).

solacing their wounded feelings. . . ." *See* STUART M. SPEISER, RECOVERY FOR WRONGFUL DEATH 327 (1975). Federal wrongful death statutes, like DOHSA, generally exclude damages for mental anguish and grief. As the Supreme Court in *Miles* also observed, a majority of states has also denied recovery for grief. *Miles*, 112 L.Ed.2d at 92. S. SPEISER', at 327-28.

Mental anguish and grief usually do not arise out of actual injury but arise out of the shock and trying experience of coping with the death of a loved one. Wrongful death recovery generally has been extended only to cover pecuniary losses which are measurable.[9] The exception to the general rule precluding recovery for grief occurs when a survivor's damages extend beyond mere grief to actual mental injury or the aggravation of a pre-existing physical injury. Mental injury exists if the survivor has been physically debilitated by grief stemming from the wrongful death of a loved one. Mental injury is often accompanied by physical manifestations, *Floyd*, 113 L.Ed.2d at 580 n.7, 583 & 588, and may require psychological counselling and/or medical treatment. Damages due to mental injury and associated with physical injury are, therefore, "damage sustained" (as required by *Lockerbie*, 928 F.2d at 1281) and estimable when one considers, for example, losses due to

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[9]S. Speiser at 332. The pecuniary loss rule, however, has been recognized as unduly harsh by an increasing number of jurisdictions which now allow recovery for some type of mental anguish and grief either through statute or judicial construction.

Several states have statutes authorizing damages for mental anguish and grief:

Arkansas (Ark. Stat. Ann. § 16-62-102 (1992))
Delaware (10 Del. Code Ann. § 3724)
Florida (Fla. Stat. Ann. § 766.202 (1991))
Kansas (Kan. Stat. Ann. § 60-1904)
Maryland (Ann. Code of Maryland, Courts, Judicial Proceedings § 3-904(e))
Ohio (Ohio Rev. Code § 2125.02(B)(5))
Virginia (Code of Virginia § 8.01-25 (1992))
West Virginia (West Virginia Code § 55-7-6 (1992))

time out of work, hospitalization, physical injury, or medical and counselling expenses.

The issue of recovery for injury to the survivors of an air disaster under the Warsaw Convention was also discussed by the D.C. Circuit in considering KAL's liability on appeal from a jury verdict finding "wilful misconduct" and awarding punitive damages. *In re Korean Air Lines Disaster of September 1, 1983, Korean Air Lines Company, Ltd,* 932 F.2d 1475, 1487 (D.C. Circuit 1991), *cert. denied,* ___ U.S. ___, 112 S.Ct. 616 (1991). The D.C. Circuit court observed the fact that the Warsaw Convention does not specify that the damage must be sustained by the passenger in order for damages to be recoverable under the Warsaw Convention. The D.C. Circuit quoted the language of the Warsaw Convention, itself: "liable for damage sustained" and noted that the language of the Warsaw Convention was very broad. *In re Korean Air Lines*, 932 F.2d at 1485. This court, therefore, concludes that the Warsaw Convention permits a non-passenger, surviving close relatives, who can prove actual injury to himself or herself, such as actual mental injury accompanied by physical manifestations or aggravation of a pre-existing physical condition as a result of an airplane accident, to recovery for mental injury sustained. While plaintiffs in this case may not recover for grief, *per se*, they may recover for proved actual mental injury, evidenced by physical manifestations resulting from grief or the aggravation of a pre-existing physical injury resulting from grief.

It should also be noted that the Court's decision in *Floyd* concerned mental injury to passengers and not to surviving relatives. *Id.* at 580 n.7. Here we are concerned with the mental injury to surviving relatives and apply the standard used in *Floyd*.

Relevant to the individual plaintiffs' present actual mental injury is the knowledge that Muriel Kole's death was not the

result of mere negligence but the result of defendant's "wilful misconduct." Plainly a surviving relative's mental injury could be aggravated by the knowledge that the decedent lost his or her life not as a result of the airline's mere negligence but as a result of the airline's "wilful misconduct." "Wilful misconduct" is obviously a higher standard of wrongdoing than mere negligence. Because defendant's "wilful misconduct" would be a factor in assessing plaintiffs' present actual mental injury, defendant's motion to preclude any reference to KAL's "wilful misconduct," as found by the liability jury, is denied. In an ordinary case, the same jury would decide both liability and damages. The bifurcation here results from the fact that this was a multidistrict case.

Loss of Love and Affection and Companionship

Plaintiffs, as the surviving mother and sister, seek to recover for their loss of decedent's love, affection, and companionship. Recovery for loss of love, affection, and companionship differs from recovery for mental injury in that mental injury is acute and suffered by the survivor as a debilitating condition. Loss of love, affection, and companionship, on the other hand, is an injury suffered over a longer period in duration. The difference between the two injuries is the difference between personal injury and the deprivation or loss of something dear to the one deprived which affects the quality of the survivor's life in a significant way.

Defendant argues that loss of society (which covers the same ground) is not recoverable under DOHSA and that the Supreme Court's decision in *Miles* precludes recovery for loss of society. Defendant's argument is not persuasive. The Court's decision in *Miles* applies only to actions brought under the Jones Act, DOHSA, and general maritime law. Moreover, the facts of

Miles limit it to seamen. *Miles* does not limit remedies available under the Warsaw Convention. Moreover, this court has concluded that the Warsaw Convention is not limited by DOHSA.

Again, in reading the language of the Warsaw Convention, the D.C. Circuit noted that the Warsaw Convention does provide for non-pecuniary losses. The D.C. Circuit noted that the language of Article 17 of the Warsaw Convention in allowing recovery for "damage sustained" refers to "actual harm experienced, whether physical injury to the passenger or, in the case of death, monetary *or other loss* to his survivors." *In re Korean Air Lines*, 932 F.2d at 1485 (citing *In re Air Disaster at Lockerbie, Scotland, on Dec. 21, 1988*, 928 F.2d 1267 slip op. 2927 at 2959 (2d Cir. 1991)) (emphasis added). The D.C. Circuit Court interpreted "damage sustained" to include "suffering due to the death of a member of the family." *In re Korean Air Lines*, 932 F.2d at 1487.

In addition to the observations of the D.C. Circuit and the Second Circuit, it should be noted that the Fifth Circuit has twice allowed damages for loss of love and affection in cases brought under the Warsaw Convention and the Federal Tort Claims Act. In *In re Air Crash Disaster Near New Orleans, LA*, 789 F.2d 1092 (5th Cir), *vacated on other grounds*, 490 U.S. 1032 (1989), relatives of passengers killed in the crash of Pan American World Airways Flight 759 brought suit against Pan Am under the Warsaw Convention and against the United States under the Federal Tort Claims Act. A jury awarded plaintiff $250,000 for "the loss of the love and affection of his mother," and $150,000 for "the loss of the love and affection of his sister." *In re Air Crash Disaster Near New Orleans*, 789 F.2d at 1099. After discussing the intimate relationship that had existed between plaintiff and his deceased mother and sister, the court affirmed the jury verdict as to the loss as to plaintiff's mother and approved $50,000 of the original jury verdict as to the loss of plaintiff's sister. *In re Air Crash Disaster New New Orleans*, 789 F.2d at 1100.

Winbourne v. *Eastern Airlines, Inc.*, 758 F.2d 1016 (5th Cir.), *cert. denied*, 474 U.S. 1036 (1985) involved a suit brought against Eastern Airlines under the Warsaw Convention and against the United States under the Federal Tort Claims Act. Both Eastern and the Government conceded liability. Describing plaintiff as a man crushed by sudden tragedy, the Fifth Circuit affirmed the district court's award of damages for the loss of love and affection of plaintiff's wife and daughters. While Eastern's share of the total damage award was limited by the $75,000 limitation of the Montreal Agreement, the Circuit Court affirmed recovery of damages due to the loss of love and affection. *See also Caldarera* v. *Eastern Airlines, Inc.*, 705 F.2d 778 (5th Cir. 1983). (In suit brought against the airline under diversity jurisdiction applying Louisiana law and against the Government under the Federal Tort Claims Act, Circuit Court permitted award for damages including recovery for loss of companionship, love, and affection and physical and mental anguish); 1 S. SPEISER, RECOVERY FOR WRONGFUL DEATH 313-22 (2d 1975) (majority of jurisdictions allow recovery for society and companionship and several jurisdictions bound by pecuniary loss rule nevertheless allow recovery for "pecuniary value" of society, companionship, counsel, protection and attention).

Because the Second Circuit in *Lockerbie* determined that federal common law applies in interpreting the Warsaw Convention, the measure of damages available under the Convention is governed by federal common law.

Allowing survivors who are close family members of airline passengers to recover damages for the loss of love, affection and companionship when proved, in an action brought under the Warsaw Convention, is not repugnant to federal common law as presently developed and, moreover, serves the underlying purposes and goals of the Convention. Although pecuniary losses are the only losses recoverable under DOHSA, *Miles*,

112 L.Ed.2d at 290, that federal statute, governing a seaman's death on the High Seas, is not the limit of our search for a remedy under the Convention, especially when the $75,000 limit has been removed. When the limit has been removed by a finding of "wilful misconduct," the policy and underlying purpose of the Convention is to allow for full compensation, not only to the victims of an airline disaster, but to anyone who can prove that he or she sustained damages as a result of the crash of an airlines. *In re Korean Air Lines*, 932 F.2d at 1485 (citing *In re Air Disaster at Lockerbie, Scotland on Dec. 21, 1988*, 928 F.2d 1267 slip op. 2927 at 2959-60 (2d Cir. 1991)).

Plaintiffs intend to prove a close, loving relationship between the decedent and her mother and sister in this case. The court, therefore, looks to recent developments in the area of federal common law in other areas outside federal maritime law. There was a time when federal maritime law was the only source of federal tort law. However, in more recent years, the Congress has expanded the areas of federal law giving rise to tort actions, and the federal courts in the last few decades have been busily engaged in construing these new laws and fashioning federal remedies. Perhaps the most prominent area of recent development has been civil rights tort actions provided for by the Congress.

In *Bell* v. *City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984), in developing the federal common law in relation to suits under § 1983, the Seven Circuit recognized as an element of damages recoverable in such cases an award for loss of society and companionship and rejected the state bar with respect to the amount recoverable. The court expressly ruled that in implementing a federal policy underlying a federal statute, federal courts should not allow an applicable state statute inconsistent with federal policy and purpose to control. *Bell*, 746 F.2d at 1251. The court held that § 1983 was designed to allow full

recovery for the unconstitutional deprivation of life by a state official. *Bell*, 746 F.2d at 1251.

The Warsaw Convention, a federal statute, has as its underlying purpose awarding full recovery in cases where there has been a finding of "wilful misconduct," as in the instant case. *Lockerbie*, 928 F.2d at 1285-86. Where a treaty conflicts with a prior statute, the treaty supersedes the statute. *See MacNamara* v. *Korean Air Lines*, 863 F.2d 1135, 1146 (3d Cir. 1988), *cert. denied*, 493 U.S. 944 (1989). When the Senate ratified the Warsaw Convention in 1934, DOHSA was already on the statute books. If the recovery allowed by DOHSA, a prior federal statute, should conflict with the Convention in its purposes, then, of course, the Convention, which is a treaty, should prevail. *See MacNamara*, 863 F.2d at 1146. It is certainly not clear that the Senate intended to limit the recovery of airline passengers' survivors because of the existence of DOHSA and its limitations to pecuniary losses.

Disallowing recovery for loss of love, affection and companionship and other non-pecuniary losses would mean that in those cases where the survivors were not dependent on the decedent for financial support, an action under the Convention would net "little more than the cost of a casket." *Heath* v. *City of Hialeah*, 560 F.Supp. 840, 842 (S.D.Fla. 1983).

This court concludes that the loss of love, affection and companionship of a decedent by a close relative is compensable under the Warsaw Convention. Therefore, plaintiffs may recover for the losses they suffered "due to the death of a member of the family." *In re Korean Air Lines*, 932 F.2d at 1487.

LOSS OF INHERITANCE

While plaintiffs did not specifically seek damages for loss of inheritance, Rule 54(c) of the Federal Rules of Civil Procedure

authorizes the court to award appropriate damages even though they are not formerly pleaded.[10] Lost inheritance is recoverable in most jurisdictions,[11] and federal common law permits recovery for lost inheritance.[12] One early commentator wrote:

> Where the evidence shows that it is probable that the decedent, but for [decedent's] death would have accumulated property, which if he had died intestate, would have been inherited by the beneficiaries of the action, these facts constitute such a reasonable expectation of pecuniary benefit as to authorize a recovery of damages for its loss.

TIFFANY, DEATH BY WRONGFUL ACT 378 (2d ed. 1913) (*reprinted in* SPEISER at 278). Plaintiffs may recover for lost inheritance. Defendant agrees. (Memorandum of Points and Authorities in Support of Defendant Korean Air Lines Co., LTD's Motion to Strike Plaintiffs' Jury Demand, To Determine The Law Applicable to the Determination of Damages and to

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[10] Rule 54(c) states:

> Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings.

F.R.C.P. § 54(c).

[11] S. SPEISER, at 277.

[12] C. McCORMICK, DAMAGES 350 (1935). A survey of American jurisdictions reveals:

> Although there are decisions to the contrary, there is substantial authority in support of the proposition that a beneficiary's loss of an expected inheritance, or of prospective accumulations, caused by a decedent's wrongful death, is recoverable as an element of damages under a wrongful death statute, and this rule is equally applicable to federal and state wrongful death statutes.

Wrongful death damages for loss of expectancy of inheritance from decedent, 91 ALR2d 477, 478.

Dismiss Muriel Mahalek as a Party Plaintiff at 39 ("Defendant's Brief").

Lost inheritance is based on the probability of wealth accumulation by the decedent and the probability that the decedent would have left it to the plaintiffs. Future lost earnings and wages are also provable for the determination of lost inheritance.

LOSS OF SERVICES

Plaintiffs seek damages for loss of services. Defendant does not contest this recovery. (Defendant's Brief at 39-40). Loss of services is a compensable pecuniary loss and damages may be awarded where the value of services lost is measurable. *Gaudet*, 414 U.S. at 584 *rev'df on other grounds*, 498 U.S. 19 (recovery for loss of services recognized at common law). At the time of Muriel Kole's death, Marjorie Zicherman was pregnant and had planned to rely on her sister's services in raising and caring for her child. Plaintiffs may recover for measurable loss of services.

TESTIMONY OF MICHAEL KOLE

Plaintiffs moved to exclude the testimony of Michael Kole. Michael Kole is the decedent's husband. His motion to intervene in this action as a party plaintiff was denied by this court by memorandum opinion dated June 25, 1992 because his intervention would be prejudicial to plaintiffs. Mr. Kole appealed the denial of the motion to intervene; however, the Second Circuit dismissed the appeal on September 29, 1992.

Just as Mr. Kole's intervention would unduly prejudice plaintiffs, his testimony as a witness for defendant would

likewise be unduly prejudicial. Mr. Kole has brought an action arising out of the air disaster in this case in his own behalf in a federal district court in California. Therefore, plaintiffs' motion to exclude the testimony of Michael Kole is granted under Rule 403 of the Federal Rules of Evidence.

Conclusion.

All of the foregoing claimed losses must be proved at trial. The references to DOHSA do not foreclose plaintiffs' rights under the Warsaw Convention, and plaintiffs retain their right to a jury trial. Decedent's mother, Muriel Mahalek, may proceed as a party plaintiff. Plaintiffs cannot recover for decedent's loss of the quality or enjoyment of life. Plaintiffs may recover for decedent's conscious pain and suffering, for loss of support, mental injury and grief as defined by this decision, loss of love, affection and companionship, loss of inheritance, and lost services. The testimony of decedent's husband, Michael Kole, is excluded.

Dated: November 19, 1992
New York, N.Y.

CONSTANCE BAKER MOTLEY
United States District Judge